No. 12,620

IN THE

United States Court of Appeals

For the Ninth Circuit

ALFRED V. GOO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR ALFRED V. GOO, APPELLANT.

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OPINION BELOW.

The memorandum order of the District Court denying appellant's motion to withdraw plea is unreported but appears on pages 18-29 of the record.

JURISDICTION.

By information filed in the United States District Court for the District of Hawaii on February 9, 1950 (R. 2-4), appellant was charged in three counts with willfully attempting to evade taxes in violation of

the provisions of 26 U.S.C. Section 145(b). Appellant on the same day entered plea of guilty to each of these counts (R. 5, 40). His subsequent motions to withdraw plea were denied by the District Court (R. 8, 18, 29), which entered judgment and sentence thereon against appellant on June 1, 1950 (R. 29-33). Notice of appeal was filed on June 6, 1950, pursuant to 18 U.S.C. Section 3772 and Rule 37(a) of Federal Rules of Criminal Procedure thereunder (R. 34-35).

Jurisdiction of the District Court rests on 18 U.S.C. Section 3231. Jurisdiction of this Court is invoked under 28 U.S.C. Sections 1291 and 1294.

STATEMENT OF THE CASE.

This is an appeal from the conviction and sentence of appellant for alleged criminal violations of the Internal Revenue Code, imposed by the District Court on the basis of appellant's plea of guilty to those charges, and from the preceding order of the District Court denying appellant leave to withdraw his plea.

On or about January 10, 1950, appellant consulted counsel in regard to notification received from the Department of Justice indicating his imminent prosecution for claimed evasion of some $7,500 in taxes (R. 81-82, 88, 103, 139). With his attorneys and bookkeeper he attended a conference on January 20th with representatives of the Bureau of Internal Rev-

enue to determine the basis of the government's accusation against him (R. 93, 141, 159, 168). At this meeting, which lasted an hour or two, they were permitted to examine appellant's books and other materials held by the government as evidence (R. 96, 143, 159-160, 169). Appellant and his attorneys conferred several times subsequently on the matters of these criminal charges and his civil tax liability (R. 96, 144, 162).

On February 9, 1950, appellant appeared in the District Court with counsel. The Assistant United States Attorney filed in open court appellant's waiver of indictment and an information charging appellant with willfully attempting to evade income and victory tax owing by him for the year 1943 and income tax owing by him and his wife for the years 1944 and 1945 (R. 2-6, 40). Upon inquiry of the court, appellant himself pleaded guilty to each of the information's three counts (R. 5, 40). After hearing statements of counsel, the court postponed for ten days its judgment and sentence with the suggestion that appellant meanwhile settle his undetermined civil tax liability to the government (R. 5, 53).

Within one week after his entry of plea, appellant terminated the services of his former attorneys and engaged his present counsel (R. 7, 100, 150).

Upon hearing for sentence held on February 20th, the District Court granted appellant's new counsel further time to ascertain and negotiate settlement of his civil liability but denied their motion to withdraw

the plea of guilty pending full investigation of the facts (R. 8, 59-60).

Appellant on March 27, 1950, filed formal motion to withdraw plea, supported by affidavits of himself, his attorneys and certified public accountant employed to audit his accounts (R. 9-15). The District Court heard and denied this motion on May 16, 1950 (R. 16-18), entering its memorandum ruling against appellant on May 31st. By judgment and sentence entered on June 1, 1950, it imposed upon appellant for each of the three counts a fine of $1,000 and imprisonment for two years, imprisonment for the second and third counts to run concurrently (R. 30-31, 196).

ERRORS RELIED UPON.

(1) The District Court erred in ruling that appellant could not withdraw his plea of guilty as a matter of right prior to sentence.

(2) The District Court abused its discretion in refusing to allow appellant to withdraw his plea of guilty and in sentencing him to fine and imprisonment on the basis of that plea.

SUMMARY OF ARGUMENT.

Under Rule 32(d) of Federal Rules of Criminal procedure and the federal statute authorizing those Rules, a defendant has the right to withdraw his plea

of guilty at any time prior to sentence. Even if allowance of such withdrawal of plea before sentence lay within the discretion of the District Court, leave should be granted upon a showing of mistake, fear or other influence causing the defendant to plead guilty when he may have any defense at all. This appellant showed such grounds justifying withdrawal of his plea.

ARGUMENT.

I. WITHDRAWAL OF PLEA OF GUILTY BEFORE SENTENCE IS A MATTER OF RIGHT.

At the outset, we concede that this proposition rests on little authority other than the language of the Federal Rules.

These rules were promulgated by the Supreme Court pursuant to authority conferred by federal statute.[1] This enabling legislation leaves no doubt as to the solicitude of Congress for an accused person, who has entered a plea of guilty, by expressly providing:[2]

> This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

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[1]Sections 3771 and 3772 of Title 18, United States Code, Crimes and Criminal Procedure, effective September 1, 1948 and re-enacting substantially the provisions of former 18 U.S.C. Sections 687 and 688.

[2]18 U.S.C. Section 3772, Procedure after verdict.

We do not contend that this provision grants or preserves the right to withdraw a plea of guilty within its prescribed limitations rather than the bare right to apply therefor, although such construction would doubtless be permissible as a matter of first impression. Judicial interpretation has been otherwise, holding that the statute gives no absolute right to withdraw a plea but deals merely with the limit of time within which application to withdraw may be filed.[3]

Like effect was given to the rule first adopted under that statute. This rule provided:[4]

> A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

Under this rule it was consistently held that withdrawal of a plea of guilty, even when requested by motion within ten days after entry of such plea and before sentence, was not a matter of right, but that allowance thereof lay within the sound discretion of the trial court.[5] Moreover, the rule's limitation upon time for filing such motion was given jurisdictional

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[3]*United States v. Colonna*, 142 F. (2d) 210 (C.C.A. 3d, 1944); *Farnsworth v. Zerbst*, 98 F. (2d) 541 (C.C.A. 5th, 1938).

[4]Rule II (4), Rules in Criminal Cases effective September 1, 1934; 292 U.S. 661, 662.

[5]*Bergen v. United States*, 145 F. (2d) 181 (C.C.A. 8th, 1944); *United States v. Colonna, supra; Farnsworth v. Zerbst, supra; United States v. Denniston*, 89 F. (2d) 696 (C.C.A. 2d, 1937); *cf. United States v. Fox*, 130 F. (2d) 56 (C.C.A. 3d, 1942); *Ward v. United States*, 116 F. (2d) 135 (C.C.A. 6th, 1940); *see Swift v. United States*, 148 F. (2d) 361 (C.A.D.C. 1945).

effect. Whether the motion was made more than ten days after plea but before sentence,[6] or less than ten days after plea but following sentence,[7] it was dismissed as tardy, to the same effect as though filed more than ten days after plea and after sentence.[8]

In adopting the new[9] Federal Rules of Criminal Procedure, however, the Supreme Court clearly implemented that legislative concern for the rights of an accused. It differentiated between withdrawal of plea of guilty before sentence and after sentence by providing in Rule 32(d):

> *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

It must be noticed that the above rule contains two separate and distinct clauses, the first relating to

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[6] *Von Moltke v. Gillies*, 161 F. (2d) 113 (C.C.A. 6th, 1947), *rev'd on other grounds* 332 U.S. 708 (1948) (motion ten months after plea);
Hood v. United States, 152 F. (2d) 431 (C.C.A. 8th, 1946) (motion four weeks after plea);
United States v. Achtner, 144 F. (2d) 49 (C.C.A. 2d, 1944) (motion twelve days after plea).

[7] *Jackson v. United States*, 131 F. (2d) 606 (C.C.A. 8th, 1942) (motion one week after plea).

[8] *United States v. Mignogna*, 157 F. (2d) 839 (C.C.A. 2d, 1946) (motion seven months after plea and sentence);
Swift v. United States, supra note 5 (motion more than one year after plea and sentence);
Farrington v. King, 128 F. (2d) 785 (C.C.A. 8th, 1942);
Cooke v. Swope, 28 F. Supp. 492 (W.D. Wash., 1939), *aff'd* 109 F. (2d) 955 (C.C.A. 9th, 1940).

[9] Effective March 21, 1946.

withdrawal of plea before sentence and the second dealing with such withdrawal after conviction and sentence. These provisions, when read against the backdrop of the pre-existing rule and its settled construction, manifest an intention to accomplish more than mere enlargement of the time for filing a motion to withdraw a plea of guilty.

Historically, the harshness heretofore noted in Rule II (4) had evoked much criticism of the courts which were constrained to apply it according to its terms.[10] Professor Orfield, speaking in 1942 as a member of the Advisory Committee on Rules of Criminal Procedure of the Supreme Court, commented as follows:[11]

> The present Rule II (4) provides that a motion to withdraw a plea of guilty must be made within ten days after entry of such plea. Is not this an undue hardship on the defendant, and should we not adopt the rule now prevalent in many states which permits withdrawal of the plea at any time before sentence?

That authority also remarked[12] that Section 230 of the American Law Institute Code of Criminal Procedure (1930) goes even further and permits setting aside of a judgment so that the plea may be withdrawn. Apparently, as observed by the Court of Appeals for the Eighth Circuit,[13] he expressed the

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[10] *See Von Moltke v. Gillies, supra* note 6, 161 F. (2d) at 116; *Swift v. United States, supra* note 5, 148 F. (2d) at 362; *United States v. Achtner, supra* note 6, 144 F. (2d) at 52.

[11] Orfield, Procedure in Federal Criminal Cases, 2 F.R.D. 573, 577.

[12] [*See*] 2 F.R.D. at 577, note 16.

[13] *See United States v. Achtner, supra,* 144 F. (2d) at 52.

views of the Advisory Committee which recommended a substantially more liberal rule. It seems likely that the Committee in recommending the new rule, and the Supreme Court in adopting it,[14] acted upon these two suggestions of Professor Orfield by incorporating them respectively in the first and second clauses of Rule 32(d).

Grammatically, also, the new rule evidences a clear intention by the rule-making body to place withdrawal of a plea of guilty before sentence on a different basis than subsequent withdrawal. Had the Supreme Court desired to effectuate only a narrow purpose of enlarging time within which to present a motion for withdrawal of plea, it could easily have done so by means of one inclusive clause without resort to separate clauses relating to the two chronological stages of the criminal proceeding. It chose the latter rather than the simpler form of expression. It did so advisedly, upon the recommendation of a committee of eminent members of both bench and bar. Moreover, it specified a judicial standard to guide the District Court in permitting withdrawal of plea after sentence but imposed no such limitation upon withdrawal before sentence.

Clearly a defendant now has no unqualified right after conviction and sentence to withdraw his plea of guilty. Allowance of his motion to do so is a matter of discretion to the trial court in order *to*

[14]Mr. Justice Black in *Von Moltke v. Gillies*, 332 U.S. 708, 718 note 4, commented that the former rule had been liberalized by Rule 32(d).

correct manifest injustice. That standard for the court's exercise of discretion in cases after sentence is uniformly held, in decisions under the second clause of Rule 32(d), to require of the convicted defendant a showing of some reason why the judgment should not stand against him—a reason amounting to a fraud or imposition upon him, or a misapprehension of his rights, making it manifestly just and fair to give him the privilege to substitute pleas.[15]

This same test of "manifest injustice" likewise governed the granting or denial of any motion to withdraw a plea of guilty prior to 1934.[16] On the subject of withdrawal of plea, the Court of Appeals for the Seventh Circuit stated:[17]

> If such a plea is inadvisably made, or is contrary to the truth, the accused should not be held strictly to his plea. He should be, and so far as our observation goes, he is, permitted to change the plea.

And dictum of the Supreme Court in *Kercheval v. United States,*[18] wherein the District Court had al-

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[15] *United States v. Searle,* 180 F. (2d) 209 (C.A. 7th, 1950); *Collins v. United States,* 176 F. (2d) 773 (C.A. 9th, 1949); *United States v. Lias,* 173 F. (2d) 685 (C.A. 4th, 1949); *Stidham v. United States,* 170 F. (2d) 294 (C.A. 8th, 1948); *United States v. Harris,* 160 F. (2d) 507 (C.C.A. 2d 1947); *United States v. Mignogna, supra* note 8.

[16] *Rachel v. United States,* 61 F. (2d) 360 (C.C.A. 8th, 1932); *Roberto v. United States,* 60 F. (2d) 774 (C.C.A. 7th, 1932); *Scheff v. United States,* 33 F. (2d) 263 (C.C.A. 8th, 1929); *Gleckman v. United States,* 16 F. (2d) 670 (C.C.A. 8th, 1926); *United States v. Bayaud,* 23 Fed. 721 (C.C. S.D. N.Y. 1883).

[17] *Roberto v. United States, supra,* 60 F. (2d) at 775.

[18] 274 U.S. 220, 223 (1927).

lowed withdrawal of the defendant's plea of guilty and the sole issue on appeal was the admissibility of the plea as evidence upon trial, has become the rule of decision applicable whenever the motion to withdraw plea is addressed to the discretion of the trial court:

> "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences * * * But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. * * * The court in the exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.[19]

The essence of those decisions[20] under former Rule II(4) was stated succinctly by the court in *Bergen v. United States,*[21] as follows:

> We think it may be gathered from all of the cases that an accused is entitled to withdraw a plea of guilty if it fairly appears that he was in ignorance of his right and of the consequence of his act, or if it appears that the plea was made under some mistake or misapprehension. The

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[19]Quoted in part in *Von Moltke v. Gillies, supra,* 332 U.S. at 719, as the basis for determining such motions under Rule II (4).

[20]Cases cited in note 5 *supra.*

[21]145 F. (2d) 181, 187 (C.C.A. 8th, 1944).

> withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant on a trial might or probably would be found guilty. While the burden is on the accused to show cause for the change of his plea, the court's discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially where the defendant is without the advice of counsel and his motion is seasonably made. And, in any case, the motion should not be denied where it is evident that the ends of justice would best be served by granting it.

It is thus seen that the principle, that the trial court's discretion should be exercised by granting a timely motion for withdrawal of plea of guilty "if for any reason the granting of the privilege seems fair and just", was brought forward from the earlier decisions to govern those cases within Rule II(4); and it has since been carried on to apply in cases within the second clause of Rule 32(d). In short, the standard by which the court must exercise its discretion, in ruling upon such motions made after sentence, has been thoroughly explored over the years and is now crystallized. The showing of "manifest injustice" required to support any such motion made after sentence has been fairly defined by judicial decision.

But what is the criterion of decision in those cases falling within the first clause of Rule 32(d), of motions to withdraw plea of guilty made before sentence is imposed? Are those motions addressed to the sound

discretion of the court; and, if so, does the same standard order its exercise of discretion as in cases of like motions made after sentence?

Significantly, the Supreme Court prescribed no such standard by the first clause of its new rule. It did not qualify the right to withdraw a plea of guilty by requiring the moving defendant to show "manifest injustice" in such cases.

The implication is clear: Rule 32(d) leaves no residuum of discretion in the District Court by which to deny any motion made before sentence to withdraw a plea of guilty; it places upon the defendant no onus of persuading the District Court that the granting of such motion would be fair and just; and it allows him, through the medium of such motion, to withdraw his plea of guilty as a matter of right.

Under any other construction given the first clause of Rule 32(d), that clause loses all independent significance and becomes a mere preface to the second clause, modified by the latter's restriction upon withdrawal of plea. So, then, must the separation of thought apparent in both punctuation and chronological context of the rule be disregarded. We are unwilling to ascribe to the Supreme Court the ambiguity in expression, prolixity, and ineptness of draftsmanship implicit in such an interpretation of two simple and perfectly harmonious clauses.

Construed together as integral yet distinct sections of the same rule, they convey the substantive meaning that the defendant before imposition of sentence

is entitled without limitation to withdraw his plea of guilty on motion; and that after sentence, he is so entitled upon motion supported by a showing of some reason why his substitution of pleas is fair and just.

Support is given this view by the absence of judicial opinion in point. Search of the reports reveals no decision interpreting the first clause of Rule 32(d), all of the reported cases[22] dealing with motions made after conviction and sentence and applying—quite properly—the second clause of the rule. In fact, several of the decisions[23] relied on by the court below (R. 22) in rejecting this construction of Rule 32(d) do not even consider or make reference to that rule. Undoubtedly this absence of decisions construing the first clause of the rule exists because District Courts uniformly grant (as a matter of course) the accused's motion prior to sentence, and that action is not reviewable.[24]

We submit that appellant's motions to withdraw his plea of guilty, twice duly made before imposition of sentence, should have been granted as a matter of right under Rule 32(d); and that the District Court erred in denying those motions on the ground that their disposition rested in the area of judicial discretion.

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[22]Cases cited note 15 *supra*.

[23]*Taylor v. United States*, 179 F. (2d) 640 (C.A. 9th, 1950), and subsequent appeal dismissed 180 F. (2d) 1020.

[24]*United States v. Lias, supra* note 15, 173 F. (2d) 685.

II. DENIAL OF APPELLANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY BEFORE SENTENCE WAS AN ABUSE OF DISCRETION.

Assuming *arguendo* that a motion made by a defendant before sentence to withdraw his plea of guilty is addressed to the discretion of the court, under Rule 32(d), still the record shows an abuse of discretion in the denial of appellant's motion.

The affidavits (R. 9-15) filed by appellant in support of his motion to withdraw plea speak for themselves.

Appellant himself alleged his unfamiliarity with the court's criminal procedure when he appeared in court on February 9, 1950 (R. 9); that at the time he entered his plea of guilty, following advice of his then counsel, no audit had been made of his books to determine whether he owed the taxes claimed in the information (R. 9-10); and that he pleaded guilty through fear, ignorance, confusion and expediency (R. 10). He further alleged that subsequent to pleading he felt he had been mistaken and engaged new counsel (R. 9); that his attorneys hired certified public accountants to investigate his tax liability (R. 10); that an incomplete audit of his books had revealed factors which eliminated his tax liability for 1945 and reduced by an indeterminate amount that liability for 1944, two of the years in question (R. 10); and that he did not know whether or not his residual tax liability, if any, constituted fraud (R. 10). He also set forth that claimed loss of his cancelled checks by the United States Internal Revenue

agents prevented verification that certain refunds from commission houses, asserted by those agents to be unreported income, were actually not taxable (R. 10-11). In these circumstances of insufficient information, he concluded, his attorneys did not and could not advise him to plead guilty (R. 11).

Affidavits of appellant's attorneys and accountant, who investigated his tax liability, substantiated his statements that apparent factors not credited by the Internal Revenue officials reduced materially that liability for 1944 and 1945 (R. 12-14). On the basis of this investigation, his attorneys stated that they could not advise appellant to plead guilty or allow that plea to stand (R. 15).

The facts thus presented, which were not denied by affidavit or other document of the appellee, may be segregated into two general grounds justifying appellant's withdrawal of his plea of guilty. First, although represented by counsel prior to and at the time of pleading, he entered his plea inadvisedly as a result of fear, ignorance, confusion and expediency. Second, neither appellant nor his counsel knew the true state of facts forming the basis of the government's charges against him, and he therefore pleaded in mistake and misapprehension of those facts and their consequences. Little light was shed on the latter ground at the hearing of the motion, for the court announced that it considered the matters relating to actual tax liability—which appellant offered to show by testimony of the auditing accountant—irrelevant to the motion (R. 78-79, 101). Ap-

pellant's showing was therefore confined to his own testimony (R. 80-101).

Appellant acknowledged consulting his attorney several times before entering his plea. In discussing on one of these occasions the amount of tax claimed by the government, some $7,500, he protested that he owed nothing like that sum. To this his attorney reportedly told him he was guilty just the same even if he owed one dollar, and that it was best to plead guilty (R. 82-98). Appellant stated that his attorney advised him to plead guilty (R. 84, 87, 97), that he had no other alternative, that if he argued the court would give him a long-term prison sentence, and that the best thing for him was to keep his mouth shut and say nothing (R. 85, 87). He had never been in a court room or had any knowledge of criminal proceedings prior to this case (R. 84, 85); and since he had employed counsel to advise him, he followed that advice (R. 87).

Thus appellant explained the reasons for entering his plea. It was induced in part by fear—fear of long imprisonment if he contested the government's charges or disputed the amount of tax claimed; in part by ignorance—ignorance of the technical elements constituting the crimes with which he was charged, of court procedure and the presumption of innocence which protects every citizen until disproved, and of the legal inaccuracy of his attorney's opinion that he was guilty if he owed $1 or $7,500 in taxes; and in part by expediency—being

advised to plead guilty and say nothing. An additional element of confusion arose in appellant's mind through the injection into this criminal proceeding of matters relating to his civil liability for taxes, as he did not at the time appreciate the difference between civil and criminal liability (R. 100-101).

The government sought to refute these subjective misconceptions in the mind of appellant, which motivated him to plead guilty, by introducing the testimony of his former attorneys as to what had passed between them and their client.

One denied advising appellant to plead guilty, although stating in the same breath that it was his suggestion (R. 143, 148). His associate, however, admitted that they—the attorneys—advised appellant to plead guilty, told him that it would be to his advantage not to put the government to the expense of trying the case (R. 135, 160-162). This much is certain, that these attorneys advised appellant over a period of some weeks, and nowhere do they suggest that they advised any plea other than guilty.

On the face of the record it comes to this: one of appellant's former attorneys corroborates his statement of the advice he received, while the other denies it. There is, to say the least, a strong inference that somewhere in the course of his conferences with his attorneys appellant gained the belief that he had no alternative but to plead guilty, that resistance of the charges against him would be futile and only result in a much harsher sentence than if

he said nothing. Precise words spoken between attorney and client are not in issue here, the sole inquiry relating to appellant's state of mind when he entered his plea.

Perusal of the record can leave no doubt, moreover, that at the time they were advising their client regarding the government's impending prosecution, appellant's former counsel were singularly uninformed of the taxes which he had allegedly attempted to evade. They made no investigation of his books and records, employed no accountants to examine into his tax liability, made no recommendation that he procure such an audit, and did not even talk to his bookkeeper until after the plea; in fact, despite appellant's disclaimer of the tax obligation asserted by the government, they made no effort whatsoever to ascertain independently the amount of his unpaid taxes, if any (R. 83). They accepted without reservation the deficiencies represented by Internal Revenue agents, apparently content to glance over a few cancelled checks and pages of appellant's books during one brief conference (R. 95-96, 143, 159-160, 168-170). While this inspection may have satisfied them that the taxes claimed were actually owing, it did not satisfy appellant, who engaged new counsel. That occurred after he had pleaded to the information, of course; but only then, after new counsel had partially developed the true status of his tax liability, did he appreciate the enormity of his mistake in both fact and law.

Nothing in the record impugns appellant's testimony that, had he known about his income tax what he learned subsequent to the date of pleading, he would not have entered a plea of guilty in this case (R. 85).

If the granting or denial of a motion to withdraw a plea of guilty before sentence be deemed to lie within the discretion of the District Court, the only question for decision here is whether this showing made by appellant was sufficient to warrant allowance of his change of plea. That sufficiency must be measured against the several criteria of "manifest injustice" established by the decisions, heretofore reviewed.[25] To recapitulate briefly, an accused will be allowed to withdraw such plea if—

given through ignorance, fear or inadvertence[26]

or—

made under any misapprehension or mistake[27]

or—

inadvisedly made, or is contrary to the truth[28]

or—

some reason existing when it was entered, but for which he would not have entered the plea[29]

or—

entered because of misunderstanding of its effect or because of misrepresentation.[30]

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[25]*See* Part I *supra.*
[26]*Kercheval v. United States, supra,* 274 U.S. at 224.
[27]*United States v. Bayaud, supra,* 23 Fed. at 722.
[28]*Roberto v. United States, supra,* 60 F. (2d) at 775.
[29]*Rachel v. United States, supra,* 61 F. (2d) at 362.
[30]*Ward v. United States, supra,* 116 F. (2d) at 137.

The effect of the decisions bearing on this subject is well summarized by the Court of Appeals for the Fourth Circuit, as follows:[31]

> The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury.

We submit that appellant made a clear showing of justification for his change of plea within the above principles. From the evidence presented there is good reason to believe that his plea of guilty was actuated in considerable degree by fear, ignorance, misapprehension, mistake and misunderstanding. Certain it is that he pleaded inadvisedly, without proper investigation of the facts by either himself or counsel, and that the facts and law as he subsequently understood them render the plea contrary to the truth. As Judge Stephens of this Court has so recently stated concerning a plea of guilty:[32]

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[31] *United States v. Lias, supra* note 15, 173 F. (2d) at 688, quoting with approval 14 Am. Jur. 961-962.

[32] Dissenting in *Collins v. United States, supra* note 15, 176 F. (2d) at 777.

> One who so pleads may be bound thereby, but it is imperative that the chosen course of action be undertaken with full knowledge of the facts and probable consequences * * *

That requisite knowledge of the facts at the time of pleading was undeniably lacking here. Such defect in comprehension, alone, constitutes sufficient reason why "the granting of the privilege seems just and fair".[33]

One serious consideration remains. The record makes plain that the District Court, in deciding the motion to withdraw plea, felt that its dignity had been affronted by a telephone call on behalf of appellant and an endeavor by appellant to speak personally about his case, events which reportedly occurred between pleading and the time when present counsel took up his defense (R. 20, 29, 57, 186). What implications the court attached to these extra-judicial matters were shown by its remark that the motion would have "smelled sweeter" in their absence (R. 29). We cannot accept such characterization of this motion as proper or justified by the circumstances. For all that appears in the record, the incidents to which the court referred were the efforts of some well-meaning but misguided friend. But whether or not the court below was justly exercised, such factors should not have influenced the court in exercising its discretion. This resembles the situation in *Bergen v. United States,*[34] wherein the appellate court took

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[33]*See Kercheval v. United States, supra,* 274 U.S. at 224.
[34]145 F. (2d) 181 (C.C.A. 8th, 1944).

notice that, in denying a similar motion to withdraw plea of guilty—

> The court was clearly influenced in his conclusion by information which had reached him of conversations between the accused and the marshal which gave support to the idea that the accused had changed his mind by reason of influence brought to bear upon him by other defendants in similar cases pending in the court.[35]

Since that knowledge acquired outside the hearing was not evidence or relevant to the motion, the question being neither the probable guilt of the accused nor what caused him to change his mind, judgment denying the motion was reversed.

In ruling that appellant had provided no basis upon which it could exercise its discretion in favor of the motion (R. 29), the court below was thus influenced in immeasurable degree by matters neither evidential nor relevant. Such influence, reacting upon the mind of the court to discredit the sufficient reasons shown by appellant for his change of plea, led it to an abuse of discretion in denying the motion and predicating judgment and sentence upon appellant's plea of guilty.

The liberal tenor of decisions granting leave to withdraw a plea after conviction and sentence leave no doubt that the court's action, with respect to withdrawal of plea *before* sentence, amounted to abuse of discretion in these circumstances—if, indeed, the

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[35] *Id.* at 188.

trial court has discretion in such a moment. In one such case,[36] the court not only allowed the defendant after judgment and sentence to withdraw a plea of *nolo contendere* but refunded those fines which remained in the court's registry. In another, the Supreme Court acknowledged the great reluctance with which courts customarily act upon a plea of guilty, quoting recognized authorities as follows:[37]

> Since a plea of guilty is a confession in open court and a waiver of trial, it has always been received with great caution. It is the duty of the court to see that the defendant thoroughly understands the situation and acts voluntarily before receiving it.

And further:[38]

> Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment.

Appellant seeks no judgment of acquittal in this proceeding. He only asks adherence to Blackstone's precept, that he be allowed to retract his "confession" and plead anew to the information because of mis-

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[36]*United States v. Western Chemical & Mfg. Co.*, 78 F. Supp. 983 (S.D. Cal. 1948).

[37]*See Von Moltke v. Gillies, supra*, 332 U.S. at 719, note 5, quoting with approval Orfield, Criminal Procedure from Arrest to Appeal (1947) at 300.

[38]*Ibid.* quoting 4 Blackstone, Commentaries at *329.

conceptions entertained when he first pleaded. On this very basis another court, demonstrating that liberality of discretion which pervades treatment of this subject by the federal judiciary, allowed withdrawal of plea after sentence, saying:[39]

> If the defendant had that bona fide belief in his mind and if that belief was a controlling factor in causing him to enter a plea of guilty, the court has to take that belief into consideration, irrespective of the kind of information upon which it was founded. In any event, my conscience will not permit me to be a party to sending a man to the penitentiary upon a plea of guilty when he insists that he did not commit the acts constituting guilt.

That rationale, applied to the circumstances here disclosed, should have moved the discretion of the court below to permit withdrawal of appellant's plea of guilty.

CONCLUSION.

For the foregoing reasons, we submit that the order and judgment appealed from should be revealed, the sentence imposed upon appellant vacated, and this cause remanded to the District Court for the District of Hawaii with directions to allow appellant to with-

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[39]Baker, District Judge, quoted by the Circuit Court in *United States v. Lias, supra* note 15, 173 F. (2d) at 687.

draw his plea of guilty and to enter a plea of not guilty therein.

Dated, Honolulu, Hawaii,
October 27, 1950.

Respectfully submitted,
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